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No. [redacted] 31

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit
and
BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now James Karl Muschany and Vera Muschany and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on the 22nd day of December, 1943, in the case lately pending in said Court of Appeals, entitled United States of America, Appellant, versus James Karl

Muschany and Vera Muschany, Appellees, bearing number 12,561, of causes on the docket of said Circuit Court of Appeals, reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of these petitioners and against said respondent; which said judgment of the said Court of Appeals became final on the 14th day of January, 1944, by the overruling by that Court of petitioners' petition for rehearing of said cause.

OPINION OF THE COURT BELOW.

The opinion of said Court of Appeals in the above-mentioned case which petitioners here seek to have reviewed has not yet been reported, but appears on pages 690 to 703 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The suit above referred to was instituted by the United States of America against these petitioners to condemn land to be used by the War Department for the erection of an ordnance plant to manufacture TNT for the use of the armed forces of the United States (R. 4-10).

A declaration of taking was filed on the 7th day of April, 1941 (R. 4-12). Judgment of condemnation on the declaration of taking was entered on April 9, 1941 (R. 13-16). The taking included tract No. 24-233, consisting of 33.33 acres of land owned by the petitioners herein.

On the 17th day of May, 1941, these petitioners filed an answer to the petition in condemnation in which they alleged that prior to the institution of said suit the United States Government, through its duly authorized agent, had entered into a contract with these petitioners to purchase said land at the price of $4,500. The terms of the

contract were set forth and the petitioners prayed the Court to dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price, pursuant to the terms of said contract (R. 18-20).

A reply to said answer was filed, followed by the filing of an amended reply and on April 3, 1942, by the filing of a second amended reply to the answer (R. 21-37), in which the Government alleged that the purchase contract was fraudulent because of certain alleged fraudulent representations; contrary to public policy and violative of a provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix, Sec. 1171, known as Public Act No. 703.

On account of the large number of cases wherein the validity of the contracts was involved, and the importance of said cases, the three District Judges sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet; and he made the rulings on the evidence offered and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 Acres of Land in St. Charles County, Mo., 45 Fed. Sup., p. 1016.) The other two Judges went to their respective court rooms after the trial of the first case and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases, and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of the statute of the United States known as the Act of July 2, 1940 (Public Act No. 703), above cited, prohibiting the making of contracts by the Government on the basis of cost-plus-a-percentage-of-cost.

Judge Davis, in the Muschany case, decided that the said statute did not apply as the contract in question was

not of the character prohibited by said statute and did not violate that statute; found that the contract was valid and binding and that there was no evidence tending to show that it was procured by fraud. Judge Davis filed a written opinion which is set forth in the record herein, pages 449-460. (For decree see R. 466-468.) See U. S. v. Certain Lands in St. Charles County, Mo., 46 Fed. Supp. 920.

Judge Moore held the contract in the Andrews case valid and adopted, as far as applicable, the opinion which had been rendered by Judge Davis in the Muschany case. Judge Moore's opinion is set forth in the record herein, pages 656-657. (For decree in that case, see R. 663-665.)

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land and that commissioners should be appointed to fix the value of the land in question in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date.

Judge Davis held in the Muschany case that the landowners therein (petitioners herein) were entitled to have judgment entered on the contract for the sum fixed therein, to wit, $4,500, together with interest thereon, less amount deposited in court by the Government as the estimated value of the land, pursuant to the terms of the statute applicable in such cases (R. 468).

The judgment entered by Judge Moore in his division of the court in the Andrews case was to the same effect as that entered by Judge Davis in the Muschany case (R. 665).

Separate appeals were taken by the Government in both of said cases, after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Muschany case and at the trial of the Andrews case that the evidence offered in the trial of the Cailaway case should be considered in

evidence as far as applicable in the trial of said two last mentioned cases; and therefore the parties entered into a stipulation (R. 3) which was filed in the Court of Appeals, agreeing that a joint transcript of the record might be prepared and filed and used in that court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686). That record comprised 686 pages. Ten copies of it are filed herewith, it being deemed wholly unnecessary to burden the clerk's office with twenty copies, ten in this case and ten in the Andrews case in this court.

After the taking of all proper proceedings pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689); and on the 22nd day of December, 1943, said Court handed down an opinion entitled in both of said cases, though a separate judgment of reversal was entered by that Court in each of said cases (R. 703-704).

We deem it appropriate to refer a little more in detail to the evidence offered in the District Court. That offered in chief by the Government showed clearly that all proper proceedings had been taken by the Government to authorize the District Attorney to institute and prosecute proceedings for the condemnation of said lands and institution of the suits (R. 42-44).

Evidence offered by petitioners showed that prior to the institution of the suits for condemnation, and at the direction of the Quartermaster General, Lieutenant-Colonel R. D. Valliant of the Quartermaster Corps, in charge of the real estate branch of that department (R. 50), undertook the work of negotiating for the purchase of lands in said area, and was properly designated to make contracts for such purchases, the War Department being authorized to acquire lands for such purposes as that involved here, either by purchase at such price as in the opinion

of the Secretary of War was reasonable, or by condemnation (U. S. C. A., Tit. 50, Sec. 171).

The area involved was a very large one, embracing approximately 18,000 acres of land in St. Charles County, Missouri, something like 30 miles west of the City of St. Louis.

A man by the name of R. Newton McDowell came into the area in October or November, 1940, and began negotiating with landowners for option contracts on their respective lands in said area. Learning of the project, the landowners chose a committee to look after their interests. That committee telegraphed the Secretary of War at Washington, D. C., inquiring as to who was authorized to represent the Government in negotiating for the purchase of such lands, the landowners not being sure of the authority of McDowell. In reply to that telegram, the Secretary of War, on November 9, 1940, sent the following telegram to the chairman of said committee:

"Nov 9 110P

E R Sutton Citizens Committee
St Charles Mo

Reurtel Oct Twenty Eight Weldon Springs Mo. Area Has Been Approved by War Dept for Munitions Plant Site Stop Property Will Be Purchased by Mister R. Newton McDowell and Agents Representing Office of the QM General Stop Mr. McDowells Organization Directly Represents the Government

Stimson, Secy of War,
Wash DC" (R. 52-53)

Being thus assured of McDowell's authority to represent the Government, these petitioners and many other landowners entered into negotiations with McDowell and as the result of such negotiations the contract here involved was furnished to the petitioners by McDowell, was filled in by him and then signed by petitioners and turned over

to McDowell for him to forward to the War Department. The price agreed upon as the purchase price in the contract was $4,500.

In securing the option contract in question in this case, as in all other cases, printed blanks which had been prepared by an attorney for the War Department and furnished to McDowell were used by him (R. 308). All of them were on printed forms precisely alike, merely leaving spaces for the date, the description of the land in question, the price agreed upon and the signatures of the owners. The Muschany contract is set forth in full on pages 342-344, inclusive, of the record.

The offer set out in the option contract, in a lump sum, the price to be paid by the Government, and provided that out of it the owner should pay McDowell 5 per cent and all expenses of clearing the title (Rec. 342-344). It contained no provision whereby, after the Government accepted the offer, the amount to be paid by the Government or to be received by the owner or anyone else could be in any wise increased above the sum specified in the offer. When the Government accepted the offer the total cost was fully known and finally established.

The provision of the contract which gives rise to the question decided by the Court of Appeals was to the effect that 5 per cent of the purchase price fixed in said contract should be paid by the landowner to McDowell to cover his commission for services. No evidence in the record shows that the price of the Muschany land was agreed on, and that 5 per cent was added to make up the $4,500.00.

The contracts were designated as option contracts. McDowell had no authority to sign any of them, nor did he do so. He forwarded them to the office of the Secretary of War with his recommendation. The Quartermaster General had in his department experts who passed upon the contracts with relation to the prices and other features and then passed the contracts on to Col. Valliant, who was

a man of vast experience in such matters, having charge of 107 projects of similar character for the Government, totalling about $50,000,000.00. If a contract looked all right to him he signed an acceptance of it (R. 278), and one copy was then retained by him and one copy came back to the landowner, who then made a deed to his property and turned it over to the title company for approval. Immediate possession of the lands was given by the owners upon learning of the acceptance of their contracts by the Government (R. 342).

A large number of such contracts had been signed and many of the deeds had been passed and some of them had actually been recorded in the office of the Recorder of Deeds for St. Charles County, Missouri, and in a great many instances the contract prices had been paid to the landowners before the Government decided to deny the validity of any of the contracts. But when the Government had reached the conclusion that it would contest the contracts on February 7, 1941, it stopped payment on all other contracts for which the consideration had not yet been paid, including the one involved in this case (R. 82).

On the part of the Government evidence in rebuttal by men who claimed to be experts on land values was offered (though most of them resided far from the lands in question), and their estimates of the value of the Muschany land varied all the way from $1,250.00 to $2,500.00—an average of $1,972.00.

On the part of the petitioners, evidence was offered from witnesses, most of whom lived in the immediate vicinity of the lands, some of which showed the fair reasonable market value of the land in question to be $5,000.00, while some other estimates were for lesser figures, the lowest being $3,500.00—an average of $4,560.00 (see Judge Davis' memorandum, R. 451).

After all proper steps were taken by the Government this case was taken to the Court of Appeals.

In that Court the judgment of the District Court was reversed on the theory that the contract in each case was one for cost-plus-a-percentage-of-cost, and therefore void under the federal statute above cited (see opinion of Court of Appeals, R. 690 to 703), and the cause was remanded to the District Court *with directions to proceed with the case* as a condemnation suit, appointing commissioners, etc.

The Court of Appeals expressly exonerated from any charge of default or bad faith the Quartermaster Department to which the Secretary of War had delegated the performance of his duties in the purchase of the land.

Thereafter, on the 14th day of January, 1944, the petitioners' petition for a rehearing of said cause, which had been filed in due time pursuant to the rules of the Court of Appeals (R. 721), was overruled by said Court and its judgment thereby became final (R. 723).

An application to withhold the mandate of the Court for thirty days in order to permit these petitioners to apply to this Court for a writ of certiorari was sustained by the Court of Appeals by order entered on January 27, 1944 (R. 740).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Court of Appeals, is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides in effect that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari

that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was originally entered on December 22, 1943 (R. 703). A motion for a rehearing was duly filed by petitioners who were appellees in said court on January 5, 1944, within the time provided by the rules of said Court (R. 721), and said motion for a rehearing was denied by said Court of Appeals on January 14, 1944 (R. 723), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the statutes of the United States, and particularly United States Code Annotated, Title 50, Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 18), which right was denied by the decision and judgment of said Circuit Court of Appeals.

QUESTIONS PRESENTED.

The questions presented by petitioners' petition for a writ of certiorari are:

1. Whether the contract in question is a contract made on the basis of cost-plus-a-percentage-of-cost.

2. Whether the contract designated as the option contract between the United States Government and the Muschanys, petitioners herein, is valid, or whether it is void because in violation of Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703).

3. Whether the Government is estopped to deny the validity of the contract.

4. Whether the Government ratified the contract.

5. Whether the act of the War Department in entering into the contract was an administrative act which cannot be inquired into by the courts.

6. Whether the Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. Supp. 1171), was designed partially to repeal the Act of July 2, 1917 (40 Stat. 241, 50 U. S. C. A. 171), giving the Secretary of War certain powers necessary to the prompt prosecution of the war, and, if so, whether it should not be strictly construed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Court of Appeals construing an Act of Congress known as Public Act No. 703, enacted on July 2, 1940, places an erroneous construction upon said act and thereby deprives these petitioners of their rights under Section 171, U. S. C. A. 50, under which the Secretary of War had a right to use his discretion in accepting an option for lands which he deemed to be reasonable; said right having been exercised by said Secretary of War through its proper agent, and thereby having given to these petitioners a substantial right under the laws of the United States which was denied to them by said decision of the Court of Appeals.

Public Act No. 703 has no application to the contract involved in the Muschany case because said contract did not contain the elements necessary to bring it within that class of contract known as cost-plus-a-percentage-of-cost contracts, because:

(a) The inhibition in said Act of July 2, 1940, was not intended to apply to contracts for the purchase of real estate. The War Department, through its legal advisor, held that said act did not apply to purchases of real estate. See testimony of Col. Valliant (R. 287).

(b) There was no element of uncertainty or contingency involved in the commission to be paid the Government's agent, McDowell. That was definitely fixed when the option contract was accepted by Col. Valliant. The purpose of the provision in the Act of July 2, 1940, was to prevent frauds upon the Government, such as had frequently been perpetrated when the amount of the cost of a building or project was not known in advance and the commission to be paid the contractor could not, therefore, be determined in advance, and thus opportunities for stuffing pay rolls and cost of materials were seized upon by unscrupulous contractors.

2. The opinion of the Court of Appeals for the Eighth Circuit holding the contract herein invalid is squarely in conflict with the opinion of the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of

U. S. v. Grace Evangelical Church,
132 Fed. (2d) 460,

the Court of the Seventh Circuit having held in that case that a contract identical with one in this case except as to date, names, description and price, was valid, while the Court of Appeals of the Eighth Circuit in this case held said contract invalid.

3. Public Act No. 703 (of July 2, 1940) has never been passed upon by this Court, and, therefore, there is no final authority as to the proper construction of the same by the highest court in the land, from which all circuit courts of appeals can determine the proper construction of said act, and by following the same avoid confusion in different circuits.

4. The questions here presented are of very great public importance—so great as to justify the settling of the same by this Court, for the following reasons, to wit:

(a) Col. Valliant's testimony (R. 278) shows that he had 107 projects of similar character in charge and that they were widely scattered. In many instances he had made purchases on precisely the same basis as that involved in this case, and the money had been paid to the landowners by the Government.

(b) In negotiating for lands for the project in St. Charles County, Missouri, on which a TNT plant was to be erected, approximately 270 such contracts were made and it appeared from the evidence that purchases had been made on the basis of those contracts with approximately 129 landowners (R. 282), and paid for. Large sums of money were thus paid out by the Government.

(c) A large number of cases in which similar contracts were made are now pending in the District Court where the case in question was tried. A great amount of money is involved in these unsettled claims.

(d) The Government, if the decision in this case by the Court of Appeals is allowed to stand, may feel that it is its duty to institute suits to recover back large sums of money from many landowners with whom settlements were made on the basis of such contracts. If the decision of the Court of Appeals is right, then the Government has unlawfully paid out enormous sums of money in many cases. If the decision is wrong, then it deprives these landowners of money to which they are justly entitled.

Contracts of a similar character having been made in various states, the question of the validity of such contracts is likely to come before various other courts of appeals for decision. Not only the district courts in other circuits, but other circuit courts of appeals as well will, if the decision in this case is allowed to stand, find themselves confronted with conflicting decisions from the Seventh and Eighth Circuit Courts of Appeals, and if this writ is not

granted and the matter is not settled by this Court such a state of affairs will lead inevitably to much confusion on the part of the bench and the bar in the United States courts.

5. A few days before the decision by the Eighth Circuit Court of Appeals in this case was rendered the Comptroller General of the United States, Hon. Lindsay C. Warren, rendered a decision on December 28, 1943, designated as B-38,322, in a letter addressed to Col. C. H. Farrish, F. D. U. S. Army, in which he decided that in the contract there involved, which was otherwise a contract for cost-plus-a-percentage-of-cost, as it was provided that the entire cost should not exceed $6,000, was valid, as it did not fall within the class of cases in which Congress attempted to remedy an evil by prohibiting cost-plus-a-percentage-of-cost contracts. Petitioners did not know of this ruling until after their petition for a rehearing had been denied by the Court of Appeals.

It is evident therefore that both the War Department and the Comptroller General entertained the same idea for which we contend and which was found to be correct by the District Court.

6. Under the evidence revealed by the record the Government is estopped to deny the validity of the contract.

7. The Government ratified the contract.

8. The act of the Secretary of War in entering into the contract in question was an administrative act which cannot be inquired into by the courts.

PRAYER.

Wherefore, petitioners pray that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that

the said opinion and judgment of said Court of Appeals in the case of United States of America, Appellant, versus James Karl Muschany and Vera Muschany, Appellees, No. 12,561, in said court, be reviewed by this Court as provided by law, and that upon such review said judgment be reversed, and the petitioners have such other relief as to this Court may seem appropriate.

WILLIAM R. GENTRY,
Attorney for Petitioners.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the cases entitled as follows: "No. 12561. United States of America, Appellant, versus James Karl Muschany and Vera Muschany, Appellees; and No. 12562. United States of America, Appellant, versus William L. Andrews and Bertha L. Andrews, Appellees," which petitioners here seek to have reviewed, has not yet been reported, but appears on pages 691 to 703, inclusive, of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioners' petition for writ of certiorari, and in the interest of brevity they are not repeated here. Reference will be made to such facts where necessary in the course of the argument which follows:

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Court of Appeals erred in holding that the option contract between the Government and the Muschanys is of the class known as cost-plus-a-percentage-of-cost contracts, because its provisions clearly distinguish it from such contract.

II.

The Court of Appeals erred in holding that the provisions of Public Act No. 703, relating to contracts based on cost-plus-a-percentage-of-cost, rendered said option contract invalid.

III.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

IV.

The Court of Appeals erred in not holding that the Government ratified said option contract and is bound thereby.

V.

The Court of Appeals erred in not holding that by exercising the authority to enter into said contract, such authority being expressly given by law to the Secretary of War, who acted through his proper agent, the said Secretary of War did an administrative act which cannot be inquired into by the courts in the absence of fraud.

VI.

The Court of Appeals erred in holding in effect that Public Act No. 703, being part of a mere appropriation act, limited the powers given to the Secretary of War by an act that had been on the statute books since 1917 (approximately twenty-three years), to wit: "Sec. 171, U. S. C. A. Tit. 50," and in giving the provisions of said Public Act No. 703 a very broad and liberal construction instead of giving the same a very strict construction.

SUMMARY OF THE ARGUMENT.

I.

The provisions of the option contract in question clearly distinguish it from a contract made on the basis of cost-plus-a-percentage-of-cost. All of the important elements necessary to make a contract of that character are absent from the contract in question, notably all language tending to create an uncertainty whatever in the exact amount finally to be paid by the Government. All of the evils which were present under the old system of contract whereby contractors were employed to do construction work, the amount of which was unknown in advance and commissions on which would consequently be unknown in advance and on account of which Public Act No. 703 was passed, are entirely absent from the contract here involved.

II.

The option contract was not prohibited by the provisions of Public Act No. 703, and, therefore, was not violative thereof.

III.

All defenses which are available against an individual, including the defense of estoppel, are available against the Government in cases like this, wherein contracts are entered into by it in its proprietary capacity, not in its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. v. Nat'l Exchange Bank of Baltimore, 270 U. S. 527;
U. S. v. Bethlehem Steel Co., 315 U. S. 289, 62 Sup. Ct. R. 581;
U. S. v. Wright, 78 U. S. 648;
Bartlett v. Kane, 57 U. S. 263;
U. S. v. Arrendondo, 31 U. S. 691;

Belcher v. Linn, 65 U. S. 508;
U. S. v. Fuller, 14 Fed. (2d) 813;
England Bank v. U. S., 262 Fed. 121;
Pan-American Co. v. U. S., 273 U. S. 456;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673;
The Falcon, 19 Fed. (2d) 108;
State of Iowa v. Carr, 191 Fed. 257;
U. S. v. Denver & R. G. W. Ry. Co., 16 Fed. (2d) 374.

The Secretary of War having authority under U. S. C. A., Tit. 50, Sec. 171, to enter into contracts for the purchase of land for such purposes as that involved in the TNT project, and having entered into such a contract, the Government is estopped to deny the validity of such contract which he made, for all the facts and circumstances as to the manner of making the contract were fully known to the War Department's agents and with such knowledge the Government took and held possession of the land.

IV.

By its acts, after having full knowledge of the contract and all the facts and circumstances connected with the making thereof, the Government ratified said contract and could not now rescind the same, even if the contract had been fraudulently conceived and if such fraud had brought about the execution thereof.

First Nat'l Bk. of K. C. v. Seldomridge, 271 Fed. 561;
City of Findlay v. Pertz, 66 Fed. 427;
Ebel v. Roller, 21 S. W. (2d) 214;
In re: Cuban-Atlantic Transport Corp., 57 Fed. (2d) 963;
Michigan State Bank v. Hastings, 1 Douglass (Mich.) 225;
U. S. v. North American etc. Co., 253 U. S. 330, 40 S. Ct. 518, l. c. 520.

V.

The act of the War Department in entering into the option contract was an administrative act, the doing of which was delegated by law to that department, under the Act of July 2, 1917, 40 Stat. 241, 50 U. S. C. A. 171, which gave the Secretary of War full power and authority to make purchases of real estate for munitions plants, accepting offers for the sale of real estate to the Government for such purposes when in the opinion of the Secretary of War the price was reasonable.

Many similar acts by heads of various departments of the Government have been held to be administrative acts with which the courts would not and should not interfere, unless the discretion of such department representatives was abused or they were guilty of fraud, of which there is no evidence in this case, as has been expressly held by all three of the district judges and by the Court of Appeals.

U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. Rep. 427;
Barnidge v. U. S., 101 Fed. (2d) 295;
U. S. v. Threlkeld, 72 Fed. (2d) 464;
Shoemaker v. U. S., 147 U. S. 282, 13 S. Ct. Rep. 361;
U. S. v. Wright, 78 U. S. 648;
Bartlett v. Kane, 57 U. S. 263;
Belcher v. Linn, 65 U. S. 598;
U. S. v. 1997 Acres of Land, 137 Fed. (2d) 8, l. c. 14;
Lee v. U. S., 61 App. D. C., 153, 58 Fed. (2d) 879.

VI.

The effect of the decision of the Court of Appeals is that the Act of July 2, 1940 (Public Act No. 703) repealed the essential provisions of the Act of July 2, 1917 (40 Stat. 241, 50 U. S. C. A. 171) to the extent of practically destroying certain of the powers vested in the Secretary of War

by the last-mentioned act, which had been on the statute books for approximately twenty years, while Public Act No. 703 was a mere incident to and part of an appropriation act, which, in so far as it had any tendency to repeal or limit the effects of the old general statute cited, should be most strictly construed, while the Court of Appeals in its opinion gave said Public Act No. 703 a very broad construction.

ARGUMENT.

I and II.

The Court of Appeals held that the contracts with the landowners violate the prohibition against the use of a "cost-plus-a-percentage-of-cost" system of contracting contained in Public Act No. 703.

A cost-plus-a-percentage-of-cost contract is a well-recognized form of contract. **It means just what its name implies.** In such a contract one party agrees to pay the other party his cost of producing the thing desired and also agrees to pay a percentage of such cost for the services rendered by the producing party. Such a contract requires the presence of the following essential elements:

(a) The contract provides for payment **by the first party** of a base consideration **to the second party.**

(b) The base consideration is the actual cost to the second party of performing the contract.

(c) **The base consideration is not fixed in amount at the time of the execution of the contract** and is not determined until the thing desired has been constructed or produced.

(d) The contract also provides for the payment by the first party of an additional consideration or fee to the second party in the form of a percentage of the base consideration.

(e) The fee is for the services of the second party in the performance of the contract **and is paid to him by the first party.**

(f) **The fee is not fixed in amount at the time of the execution of the contract,** nor can it then be computed, for it consists in a fraction of the base consideration, which itself is not then known.

Though this method of contracting is foreign to contracts for the purchase of land, let us see if the contracts in suit comply with the above requirements.

(a) The land contracts do not contain any condition for the payment of a base consideration by the Government to the landowner, but provide for the payment of a single sum, the agreed price of the land, which was definitely known and clearly stated in the contract. The Government undertook to circumvent this difficulty by penetrating the face of the contracts by contending that since, in some instances, the landowner added McDowell's fee of 5 per cent to the net figure that the landowner demanded for his property, the Government in effect paid the landowner a base consideration in the net figure demanded by the landowner and, in addition, a fee to McDowell in the form of a percentage of the base consideration. It should be recalled that there was no proof that McDowell's commission was added to the landowner's net figure in any of the three cases tried. Whatever was done in other cases, of course, does not affect this case.

Upon acceptance of an offer from a landowner by the Government, it was obliged to pay such landowner the agreed price, and not obliged to pay McDowell anything. Suppose a judgment should be entered in the Muschany case in favor of the landowner for the amount of the contract — whom, then, could McDowell sue to recover his commission: the landowner or the Government? The answer, obviously, is the landowner, and the landowner only. Thus, whatever method was employed by the contracting parties in arriving at the agreed price, **as a matter of law the Government was obliged to pay only the landowner the agreed price for his land, and the landowner was obliged to pay McDowell.**

But even if each landowner had added McDowell's commission to his net figure, and even if the Government's acceptance of the price offered had amounted to its pay-

ing McDowell's fees, this would not make the contracts of purchase cost-plus-a-percentage-of-cost contracts, because:

(b) The consideration to be paid by the purchaser on the land contracts in suit is not the actual cost to the other party of the thing desired, but is the sum for which the landowners offered to sell their land and which the Secretary of War deemed reasonable.

(c) The consideration to be paid for the land in the land contracts was fixed in amount at the time of the execution of the contracts. There was no uncertainty or contingency of any kind connected with it.

(d) and (e) The contracts do not provide for the payment by the first party of an additional consideration or fee to the second party. As has already been said, they provide for the payment of a single consideration or sum to the second party. The fee, in the form of a percentage of the consideration of the contract is to be paid by the landowners to a person not a party to the contract, to wit, McDowell. But whether McDowell's fee is paid by the landowners, as required by the contract, or is actually paid by the Government, as contended by the Government, the fee is not paid by one party to the contract to the other party thereto, but is paid to a third person.

(f) Since the contracts provide for the payment of an agreed sum to the purchaser, the fee based thereon is fixed in amount at the time of the execution of the contract. It is wholly different from a fee to be figured later on an amount then unknown.

The primary reason for the objection in Congress to the cost-plus-a-percentage-of-cost form of contract was that in such contracts the fee for services was not fixed in amount at the time of the execution of the contract and depended upon the cost of performing the contract incurred by the contractor, a sum wholly unknown at that time, and which

could easily be arrived at later by gross frauds in stuffing pay rolls and other costs of construction or manufacture.

The essential iniquity of the cost-plus-a-percentage-of-cost method of contracting is that there is no definite ascertainment of the extent of the Government's liability under such a contract at the time of the execution of the same. On the contrary, the Government merely agrees to pay the cost of performing the contract, and to pay, in addition, a percentage of that cost to the other party for his services in performing the same. It is obvious that it is in the interest of the latter party to increase his cost of performing, as his fee, based on that cost, will be proportionately larger. But the contracts in suit do not create this iniquitous situation. **The amount to be paid the landowner is definitely fixed at the time of the execution of the contract**, so the Government knows definitely what its liability is upon the contract from the time of the execution. Furthermore, if it be assumed, for the purpose of argument only, that under the contracts as performed the Government paid McDowell's fee, **this fee, too, was fixed in amount at the time of the execution of the contracts.** Therefore, the contracts with the landowners do not, either in law or in spirit, violate Public Act No. 703, because they are not cost-plus-a-percentage-of-cost contracts.

In holding that the option did not violate the prohibition against the cost-plus-a-percentage-of-cost provision of the Act of July 2, 1940, District Judge Davis, in his opinion (46 Fed. Supp., l. c. 926; R., l. c. 453-454), said:

> "The term cost-plus is generally used in connection with construction contracts and the legal staff of the War Department advised Colonel Valliant that the clause was limited to such agreements and did not apply to contracts for the acquisition of land. The term means that a party who provides facilities, whatever they may be, will be paid his cost therefor and in addition will be paid a percentage of that cost for

> his services. Both items are payable to the same party and by the same party. The amount of each payment is unknown at the time of the execution of the contract. It is the uncertain nature of both items, particularly of the plus payment, that gave rise to the opposition to cost-plus-a-percentage contracts. The option contract in this case required the Government to make, not two, but one payment and the amount of that payment was not unknown, but known and written into the contract at the time of its execution. If it be assumed that actually the Government was paying the commission, then the amount was not uncertain but was certain at the time the contract was approved. If the payment of the land owned is to be regarded as the cost element and the commission to the agent is to be regarded as the plus element, as is argued, then the option agreement is not a cost-plus-a-percentage contract but is in reality a fixed fee agreement, which is expressly authorized by the statute."

Finally, it is obvious that the cost-plus-a-percentage-of-cost method of contracting could not be employed in the acquisition of land alone. Col. Valliant testified that he had been advised by attorneys in his department that Public Act No. 703 applied only to construction contracts (R. 287). It is probable that he meant to include contracts for the production of war materials as well as construction contracts.

The construction that Public Act No. 703 is limited to production or construction contracts, and not to the acquisition of land, excepting only in the limited sense contained within the parenthesis in the act, is borne out by an examination of the purposes of the act. This congressional enactment was passed to expedite the preparation of the national defense by removing from the Secretary of War the necessity of complying with certain restrictions theretofore imposed upon him by other statutes. An examina-

tion of these restrictions imposed by other statutes upon the Secretary of War indicates that they apply only to construction or production contracts. For example, the restriction requiring the necessity of advertising before entering into contracts necessarily applies only to construction or production contracts. It could not apply to the acquisition of a specific piece of land by the Government, because only one person owns that land, and the element of competitive bidding guaranteed by advertisements and bids cannot be applied to such a situation. Furthermore, it is impossible for either the cost-plus-a-percentage-of-cost or the cost-plus-a-fixed-fee method of contracting to apply to a contract which is devoted solely to the acquisition of land by the Government under Section 171, Title 50, U. S. C. A., for the very obvious reason that land is not acquired under this section on the basis of its cost to the owner. On the contrary, it is acquired on the basis of the reasonable value of the land at the time of the execution of the contract, as determined by the Secretary of War.

Therefore, Public Act No. 703 does not apply to the acquisition of land only, as in the contracts in suit.

These contracts were prepared by the Government, through the legal advisors in the War Department (R. 308); **offers were secured from the landowners, and the contracts accepted under an arrangement set up by the Government.** The landowners neither prepared the contracts nor set up the organization for the acquisition of the land. While the offers were being secured, the Government had every opportunity to change its method of land acquisition. By the contract between the Government and McDowell the former had the right to scrutinize his deals by inspecting and taking copies of his records evidencing his transactions. The Government sent a Department of Justice agent out to St. Charles for two weeks in Novem-

ber (R. 247), who left satisfied. Apparently the Government also was satisfied with the arrangements set up by Col. Valliant's office, because they were not changed. The Government could have ceased purchasing altogether. It was not like a private buyer who had to induce the purchaser to sell, or fail to acquire the property. The Government could condemn the lands if it failed to secure acceptable offers, and it threatened the landowners with doing just this in McDowell's letter to them announcing the project. This peculiarly advantageous position of the Government was well described by Mr. Justice Murphy in his concurring opinion in United States v. Bethlehem Steel Corporation, supra, in which he referred to the Government as enjoying "* * * both an actual and potential arsenal of powers adequate to protect its interests in dealings with private persons." (See 62 S. Ct., l. c. 592, 315 U. S., l. c. 311).

III.

The act of the Government in entering into the option contract was done in its **proprietary** capacity as distinguished from its **governmental or sovereign capacity**. Had the Government resorted to eminent domain proceedings in the first place to acquire the land in question, it would have done so in its sovereign capacity. But it saw fit to enter into contracts with the landowners for the purchase of the lands without suit, as authorized by statute, and in making such contracts it acted in its proprietary capacity. When the United States enters into a contract in such capacity it will be enforced against the United States just as a contract of similar character would be enforced against an individual person, and all defenses, equitable as well as legal, which would be available to such individual, including the doctrine of estoppel, may be invoked by the individual party to such contract, when an attempt

is made by the Government as plaintiff to have such contract declared invalid.

U. S. v. Nat'l Exchange Bk. of Baltimore, 270 U. S. 527, 46 S. Ct. 388;
Bartlett v. Kane, 57 U. S. 263, 14 L. Ed. 931;
U. S. v. Wright, 78 U. S. 648, 20 L. Ed. 188;
U. S. v. Bethlehem Steel Corp., 315 U. S. 289, 62 S. Ct. 581;
U. S. v. Arrendondo, 31 U. S. 691, 8 L. Ed. 547;
Belcher v. Linn, 65 U. S. 508, 16 L. Ed. 754;
U. S. v. Geo. A. Fuller, 14 Fed. (2d) 813;
England Nat'l Bk. of U. S., 282 Fed. 121;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

Upon the authority of the Dayton Airplane Company case and others referred to, Col. Valliant, as representative of the Secretary of War, had wide discretionary powers in the execution of the contract in question. Therefore, the doctrine of estoppel may be invoked against the Government in the enforcement of this contract and, upon the authority of other cases, referred to under this heading, rules relating to the enforcement of contracts generally will be applied against the Government.

In the Dayton Airplane case, supra, it appeared that the Government had contracted with the airplane company for the production of planes. The Court said (21 Fed. [2d] 673, l. c. 674):

> "The Government was acting by the Secretary of War in a national emergency of the first class. His discretion was unlimited; it must be exercised through subordinates; in the absence of fraud or bad faith, the exercise of such delegated authority is the Secretary's exercise of it. Rules of estoppel and fair dealing apply in full force as with individuals."

See, also:

State of Iowa v. Carr, 191 Fed. 257;
U. S. v. Denver and Rio Grande Western Ry. Co., 16 Fed. (2d) 374.

In the case at hand the Government submitted itself as plaintiff to the jurisdiction of the District Court for the Eastern Division of Missouri by commencing the eminent domain proceedings therein; and when the defendants (landowners) in this case filed their answer asserting the land contracts, the Government in its second amended reply resorted to the equity powers of the Court by asking for a rescission of the contract, alleging that it was induced by fraud and mistake. Clearly, then, these petitioners, as defendants, had the right to set up equitable defenses, including the defense of estoppel.

With full knowledge on the part of the War Department, through Col. Valliant, its agent, the War Department took possession of the land in question pursuant to the contract which its representative had signed, and continued to exercise exclusive possession and control of the same until April 7, 1941, without making any claim of fraud in the procuring or execution of the contract, and during that time paid many thousands of dollars to other landowners in the area under the terms of their contracts which had been procured precisely as the contract in question was, and which were in all essential respects duplicates thereof.

Petitioners had surrendered their land and had thus suffered loss, relying upon the contract which the Government had made with them, and it is only just and fair now that the Government should be held to be estopped from denying the validity of that contract.

IV.

Even if the Government had proved that the petitioners participated in a fraud upon the Government in procuring the option contract in question (which the Government wholly failed to do) it could not now rescind its contract because it has, with full knowledge of all the facts, ratified the same.

That the Government had such knowledge is clearly revealed by the record, especially by the testimony of Col. Valliant, to which various references have been made herein (R. pp. 276-308). The Government, through Col. Valliant, signed the written acceptance of the Muschany contract on the 3rd day of December, 1940. It then took immediate possession of the land and has held it ever since that time. It continued to hold possession of the land under said contract, with full knowledge as aforesaid, during all that time until April 7, 1941, before it instituted suit to condemn the land and filed its notice of taking.

The doctrine of ratification applies to a sovereign as well as a private individual, when invoked for the purpose of enforcing a contract entered into by the sovereign.

Re Cuban-Atlantic Transport Corp., 57 Fed. (2d) 963;
City of Findlay v. Pertz, 66 Fed. 427;
U. S. v. North Atlantic etc. Co., 253 U. S. 330, 40 Sup. Ct. 518, l. c. 520.

If any party to a contract could ever be held to have ratified the same, the Government ratified the contract in question.

V.

The act of the Secretary of War in purchasing the petitioners' land by contract, instead of acquiring it by condemnation, was a discretionary act performed by an executive or administrative officer in charge of a department of the United States, and therefore the courts will not review or interfere with such act, absent proof of abuse of discretion or fraud, and there is no evidence in the Muschany case tending to show either abuse of discretion or fraud.

This rule has been applied to many different kinds of acts, not only in the acquisition of land for war purposes,

but to acts of secretaries of other departments of the Government as well. The rule is universally recognized.

U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. R. 427;
U. S. v. Meyer, 113 Fed. (2d) 387 (certiorari denied, 311 U. S. 706, 61 S. Ct. 174);
U. S. v. Certain Lands in the Town of Narragansett, 145 Fed. 654;
U. S. v. Threlkeld, 72 Fed. (2d) 464, certiorari denied 293 U. S. 620, 55 S. Ct. 215;
Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361;
Decatur v. Paulding, 39 U. S. 497, 10 L. Ed. 559;
U. S. v. Bethlehem Steel Corp., 315 U. S. 289, 62 S. Ct. 581;
Lee v. U. S., 58 Fed. (2d) 879;
U. S. v. 1997 Acres of Land, 137 Fed. (2d) 8, l. c. 14.

U. S. C. A. Title 50, Sec. 171, gives the Secretary of War authority to purchase real estate for the construction and operation of plants for the manufacture of explosives and other munitions of war and contains a proviso in these words: "Provided, that when the owner of such land, interest or rights, pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay." It is presumed that Congress uses words for some purpose. If the intention had been to provide that the Secretary of War in making such purchases should be limited to the fair, reasonable market value of lands, Congress would certainly have said so instead of using the words "which in the opinion of the Secretary of War shall be reasonable." Many things may be taken into consideration by the Secretary of War in making such contracts, which could not be taken into consideration by a jury under instructions of a court in a condemnation proceeding.

But whatever may have been taken into consideration in making option contracts with other landowners, there is no showing whatever of the consideration of anything except the fair, reasonable market value of the land in the Muschany case, for the bare land itself was purchased at a price which, in the opinion of the Secretary of War, through his duly authorized agents, was considered reasonable, and the petitioners showed by most substantial evidence that the fair, reasonable market value of their land was as much as that which the Secretary of War contracted to pay therefor.

VI.

In obtaining and accepting the offers of petitioners for the sale of their farms the Secretary of War was acting under the powers expressly granted by the Act of July 2, 1917 (C. 35, 40, Stat. 241, Title 50 U. S. C. A., Sec. 171), which provides:

> "that when the owner of such land, interest or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay * * *."

The District Courts and the Circuit Court of Appeals have exonerated the representatives of the Secretary from any bad faith in the transaction, from which it is a fair inference that the Secretary performed his duty and found the price reasonable before accepting the offer (R. 282). **Such is the presumption and the evidence as well.**

However, the Circuit Court of Appeals held that the contract resulting from the offer and acceptance was void because it violated the Act of July 2, 1940 (C. 508, 54 Stat. 712), which, after authorizing certain types of construction and purchases by the Secretary, provides:

> "that the cost-plus-a-percentage-of-cost system of contracting shall not be used **under this section;** but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." (Emphasis supplied.)

The prohibition is limited to activities "under this section" and there is grave doubt whether it was intended to affect purchases of land under the earlier act, under which the Government buys from the farmer if he submits an offer which the Secretary finds reasonable. The farmer is not a "contractor," his offer is not "cost" and the Secretary cannot buy unless he finds the offer reasonable. We think the Congress did not intend to refer to this situation when it prohibited the cost-plus-a-percentage-of-cost system in transactions under the Act of July 2, 1940. And the legal advisers of the Secretary of War were of the same opinion (R. 287).

In addition, the repeal of statutes by implication is not favored. The Act of 1940 can be given full effect by limiting it to transactions "under this section" without extending it to the partial repeal of the 1917 Act. Such was the view taken by the District Court in the case of In re Military Training Camp, 260 Fed. 986, in an almost identical situation.

If it be held that the Act of July 2, 1940, was intended to limit the powers of the Secretary under the earlier statutes, it would seem reasonable that, since the powers granted in the earlier statute were obviously necessary to the effective prosecution of the war, the limiting statute should be strictly construed and given no further effect than Congress expressly required.

The Circuit Court of Appeals has overlooked this sound rule of construction. As its opinion shows, it found that the system of purchase followed by the Secretary of War

sometimes resulted (though not in these cases) in some of the evils frequently exhibited by the cost-plus-a-percentage-of-cost system. So finding, the Court decided that the system used by the Secretary **was** a cost-plus-a-percentage-of-cost system and therefore prohibited by the Act of July 2, 1940.

As we have elsewhere shown, the total cost to the Government under the contract was both known and finally determined at the time the Secretary of War signed it, and thereafter the cost to the Government could not be increased by anyone. This is never true in the case of a cost-plus-a-percentage-of-cost contract, the distinguishing features of which are that the total cost cannot be determined at the time the contract is signed; that the Government loses control over such cost at the time the contract is signed.

It is submitted that the Circuit Court of Appeals erred in construing the Act of July 2, 1940, as limiting the powers of the Secretary of War under the Act of July 2, 1917, and in holding that the contract in question violated the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940.

In view of all of the foregoing arguments and authorities, it is respectfully submitted that the decision of the Court of Appeals herein is, upon principle, out of accord with the applicable decisions of this Court cited above, though the precise question as to the proper construction of Public Act No. 703 in such a case is a question that has never been decided by this Court; that such question is one that should be decided by this Court; that the case is one of great public importance; that in order to avoid conflicts in the decisions of courts of appeals throughout the United States, this Court should issue its writ as

prayed for herein, pass upon the various questions raised —including the proper construction of Public Act No. 703 —and thus enable many district courts and various courts of appeals to render decisions in many cases to come before them which will be harmonious and which will result in justice to all litigants interested therein.

Respectfully submitted,

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